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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 739

EARL T. ELLIS, RECEIVER OF THE QUANTICO COMPANY, INCORPORATED,

Petitioner,

vs.

CLIFTON B. CATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

Petitioner, in this reply brief, calls the Court's attention to the brief filed herein by the Solicitor General and three associates, without showing themselves by signatures to be the attorneys for the respondent in this case. Petitioner, assuming that the Court will overlook this omission and admit the brief as that of the respondent, now calls the Court's attention to its contents, form, errors, and

other omissions. Respondent's brief fails to deny the accuracy of or challenge any part of the summary statement of the matter involved, as set forth in petitioner's petition for writ of certiorari, and incorporated in his brief as facts by reference, and likewise failed to respond to the Questions Presented, as set forth in the petition for such writ, and severally discussed in petitioner's brief. The respondent, therefore, admits the truth of petitioner's statements. In 3 Corpus Juris, section 1620, p. 1446, the author said:

> "It is also a principle of general application under rules of court regulating briefs that statements in appellant's brief, which the rules provide what it shall contain, will be taken as true, unless controverted in appellee's brief. It is so held in respect to statements of the evidence, or such parts of the record as are claimed to present the errors relied on for reversal."

Rule 38 (2) of the Rules of this Court contains the following: "Only the questions specifically brought forward by the petition for writ of certiorari will be considered." This Rule was disregarded by counsel for respondent, whose brief sets forth "Questions Presented," four in number, relating to matters not appearing in the record of this case. And Rule 27 (4) of this Court provides: "The counsel for an appellee or respondent shall file with the clerk forty copies of his brief * * * such brief to be of like character with that required of the other party, *except* that no specification of errors need be given, and *that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement of the other side.*" Yet the respondent's brief, without challenging the accuracy of petitioner's brief, sets forth "Statutes Involved," followed by 28 lines of the Act of Congress of July 1, 1918, 40 Stat. 738, which had no relation to the record, also his own restricted and erroneous

"Statement," with marginal foot notes, and then a long argument in his brief, pages 7-13, of his own prepared subject matter, rather than to respond to that set forth in the brief of petitioner, including Rule 56 of the Federal Rules of Civil Procedure, and 22 citations of legal authorities.

Respondent's Other Errors

1. In respondent's brief, page 6, appears the following: "On October 12, 1948, petitioner filed a motion for summary judgment, accompanied by supporting affidavits (R. 7-8). Likewise, on May 18, 1949, respondent filed a motion for summary judgment of dismissal with supporting affidavit (R. 21-22). *Hearing was had on both motions on June 6, 1949.* These words, in italics, are followed by a foot note (3) reading as follows: "Petitioner's repeated reference (Pet. 2, 9, 18) to the *absence* of any motion by the defendant (respondent) is beyond comprehension." The record itself shows that respondent's motion for summary judgment *was not so heard;* it (R. 33) tells the story in these words: "Docket Entries. June 6, 1949. *Trial Proceedings:* George R. Humrickhouse, U. S. Attorney; John Locke Green, Attorney for Plaintiff. This cause came on to be heard on motion for summary judgment in behalf of plaintiff. Motion by plaintiff to strike defendant's motion for summary judgment. Court directs counsel to submit memorandum as to issue within three weeks." The foregoing entries are the words of the Clerk of the trial Court, and they ought not to have been disregarded by counsel for respondent here. Moreover, the petitioner's brief, at the bottom of page 7, contains the following: "On June 3, 1949, petitioner filed therein a motion to strike from the record a motion of respondent, filed May 18, 1949, for summary judgment in his favor (R. 7-20). These two motions of petitioner, *and none by the respondent,* were argued and

submitted to the District Court below (Judge Don Gilliam sitting specially) at its hearing on June 6, 1949, as appears by docket entry of the Clerk of the Court (R. 33)." And the same, in substance, was restated in petitioner's petition for writ of certiorari, pages 8, 12, and in his brief, pages 16, 18, 19, and 20. It is, indeed, beyond the comprehension of the petitioner to observe the respondent's lack of understanding of the record in this case.

2. Respondent in his brief, page 6, said: "As appears from the district court's opinion, this dismissal was based upon the propositions that title to the lands is in the United States, the issue of title and possession is *res judicata*, the action is barred by limitations, and on the fact that respondent is no longer in possession." Here, again, the respondent misinterprets the recorded opinion, to which he refers. In the very first part of that opinion (R. 26) the words of the district judge appear thus: "Each party *filed* a motion for summary judgment and a hearing was had at Alexandria, Virginia, on June 6, 1949." A hearing was had on what? The answer is in the record as made by the Clerk (R. 33).

3. Respondent's brief, page 7, under the head of "ARGUMENT," contains the following: "As appears from the decisions of both courts below (R. 25-31, 33-38), the decision below was based on the facts of record in this case and on facts and records in two previous cases in the district court, *of which facts and records that court took judicial notice.* These latter cases are *United States* v. *H. B. Gilliam and C. E. Ellis, Receivers of The Quantico Company, Incorporated,* Equity No. 33 in the district court, and *United States* v. *McIntosh,* 2 F. Supp. 244 (1932)." The reported decision in the latter case includes the *Gilliam* and *Ellis* case (2 F. Supp. at p. 250)." Again, the respondent avoids the record which shows that this case is bottomed

on Rule 56 of the Federal Rules of Civil Procedure, plus the substantive laws of Virginia relating to actions in ejectment, and such Rule and laws do not authorize a district court to take judicial notice of anything, or of other proceedings in that Court. Moreover, the record here shows that respondent failed in his answer to plead the record of any other proceeding, or any part thereof (R. 4-5). Furthermore, respondent, by his failure to file in this case any affidavit in opposition to the motion of petitioner for summary judgment, as authorized by Rule 56 (c) of the Federal Rules of Civil Procedure, thereby lost his right to present evidence before the trial court—and "judicial notice" is a species of evidence. The petitioner, notwithstanding that no record of any other proceeding was before the district court on June 6, 1949, wishes to show to this Court that the said case of *United States* v. *H. B. Gilliam and C. E. Ellis, Receivers of The Quantico Company, Incorporated,* Equity No. 33," as lodged in that district court in October, 1931, was *coram non judice* and void. The record here shows that the Hustings or Corporation Court of the City of Petersburg, Virginia, on April 8, 1931, appointed H. B. Gilliam and C. E. Ellis, Receivers of The Quantico Company, Incorporated, to take charge of all of the property of that Company (R. 10-12). Hence, these parties were officers of that court and in charge of the lands then occupied by the United States, as a lessee from that Company. In *Wabash Railroad Co.* v. *Adelbert College,* 208 U. S. 38, 54, this Court said:

> "When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while in the custody of the court which seized it."

See also the following to the same effect:

Wiswall v. *Sampson,* 14 How. 52.
Peale v. *Phipps,* 14 How. 368.
Barbour v. *Barbour,* 104 U. S. 176.
Porter v. *Sabin,* 149 U. S. 473.
Palmer v. *Texas,* 212 U. S. 125.
Reed v. *Axtel, etc.,* 84 Va. 231.

The proceedings are also void for want of jurisdiction of the subject-matter, because the United States had no legal title to the lands involved. *Frost* v. *Spitley,* 121 U. S. 552, 556; *Dick* v. *Foraker,* 155 U. S. 404, 415.

4. Respondent's brief, page 8, contains the following solemn assertion by his counsel: "On November 4, 1918, the President issued a proclamation (40 Stat. (Pt. 2) 1874, 1880-1884) taking title for the United States to the lands belonging to the Quantico Company here involved and others. It is clear that title vested in the United States by force of the statute and the proclamation. *United States* v. *McIntosh,* 2 F. Supp. 244, 249, 250-251." But the lands lie in Virginia, and the laws of that State do not recognize "proclamations" of the President of the United States as a mode for acquiring for the United States the title to privately owned lands. Moreover, the laws of Virginia provide how the title to land, in that State, shall be transferred, viz. by deed or will, *Langdon* v. *Sherwood,* 124 U. S. 74, 81. *In United States* v. *Fox,* 94 U. S. 315, 321, this Court said: "The title and modes of disposition of real property within the State, whether inter vivos or testamentary, are matters not placed under the control of the Federal Government." Moreover, the proclamation of Woodrow Wilson as President was issued at the suggestion of the Acting Secretary of the Navy, and not by authority of the Act of Congress of July 1, 1918, chapter 114, 40

Stat. 704, or any other law. Consequently, such act of the President was not the act of the Government of the United States. *Hooe* v. *United States,* 218 U. S. 322, 334, 336. Such is not due process of law, as defined by this Court in *Hagar* v. *Reclamation District,* 111 U. S. 701. That document is void on its face. And now, observe what was said by Judge Chesnut, sitting in the case of *United States* v. *McIntosh, supra,* at page 252:

> "With respect to the Presidential proclamation, it is contended that no provision is made therefor in the Act; but this is unimportant because the President is fully authorized by the Act to take over the lands without limitation as to the method to be pursued."

It has no precedent in the history of jurisprudence in this country.

5. Respondent's brief, page 10, recites the following: "The contention is based upon the fact that the Government on July 1, 1918, entered into possession of part of the lands under a lease. But that lease was to run until June 30, 1919, 'or until such time as the United States takes possession of said tract of land under authority of and with a view to the purchase thereof.' *This lease was of course terminated by the Act of the President on November 4, 1918, in taking possession and title for the United States under the authorizing statute.*" This declaration, in italics, constitutes a new and strange idea or method for terminating a contract of lease on lands. But, the lands lie in Virginia, and Section 5516 of the Code of Virginia provides the mode by which a tenancy on land may be terminated by the landlord and tenant, and such does not authorize the issuance of a presidential proclamation.

6. Respondent's brief, page 12, contains the following: "Although respondent was in possession of the property

here involved as agent of the Government when this action was filed, he ceased to be in possession as of May 17, 1949, before the case was decided (R. 22). Consequently, he has not been withholding possession of the property from anyone since that date." There is no evidence, in the record, that respondent has abandoned the possession of the lands sued for, except by an unauthorized affidavit of George R. Humrickhouse (R. 22). But, whether such affidavit is good or bad, it makes no difference in law. The suit is not abated by his absence from the premises.

18 Am. Jur., sec. 142, p. 113.

Oetgen v. *Ross,* 47 Ill. 142.

Harrod v. *Burke,* 76 Kan. 909.

Conclusion

The foregoing justifies this Court in disregarding the brief of the respondent.

Respectfully submitted,

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